Brown & Root, Inc. *and* United Food and Commercial Workers Union, Local 1657, AFL–CIO. Case 15–CA-14990–1

July 19, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On May 26, 1999, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent and the General Counsel both filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

In brief, we adopt the judge's findings that the Respondent unlawfully told the employees of the predecessor employer that they would not be able to retain the Union as their bargaining representative if they became the Respondent's employees, and unlawfully refused to hire 48 of those employees after learning that some of them wanted to continue their union representation. We also adopt the judge's findings that the Respondent was the successor employer of the unit at issue and was obligated to bargain with the Union over the unit employees' terms of employment. However, contrary to the judge, we find that the Respondent violated Section 8(a)(5) and (1) by unilaterally setting the initial terms of employment for the unit.

I. FACTS

On May 22, 1998,[2] the Respondent was selected by CIBA Specialty Chemicals Corporation (CIBA) to perform packaging and material handling work at CIBA's facility in McIntosh, Alabama. At that time, the Respondent was performing construction and maintenance services at the facility and had done so since 1953. The Respondent's construction and maintenance work force was nonunion and numbered at least 200 employees.

For 8 years before the Respondent was awarded the packaging and material handling work at McIntosh, that work had been performed by Brown-Eagle Contractors, Inc.[3] At the time Brown-Eagle lost the contract to the Respondent, its work force numbered 68 employees. Those employees were represented by the Union, whose last collective-bargaining agreement with Brown-Eagle ran from February 1, 1997, to January 31, 2000.[4]

A. The Respondent's Initial Statements of Intent to Hire Brown-Eagle Employees

The May 8, 1998 bid proposal the Respondent submitted to CIBA for the packaging and material handling operation was prepared primarily by Bill Outlaw, the Respondent's project manager at McIntosh. Outlaw's proposal contained a number of clear statements, some of which are cited by the judge, expressing the Respondent's intent to retain as many Brown-Eagle employees as possible if the Respondent were awarded the work. In fact, Outlaw used this stated intent as a selling point, emphasizing the Respondent's intent to "provide for the continuity of services through the employment of as many of the current personnel as is deemed practical." The proposal further stated:

> *Brown & Root understands the benefits of using a large portion of the existing Material Handling work force* and their immediate supervisors to provide continuity of that service and *it is our plan to do so*. [Emphasis added.]

In a May 14 follow-up letter to CIBA, Outlaw again stated:

> *Brown & Root plans to hire a significant number of the existing work force* to assure a smooth changeover in the material handling operation. *Although it is unlikely, should a large number of the existing employees decide not to join the Brown & Root team*, we will utilize members of the Construction staff to temporarily fill these *vacated* positions until permanent replacements can be hired. [Emphasis added.]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent contends in its exceptions that some of the judge's findings and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that such contentions are without merit.

[2] All dates are in 1998 unless otherwise noted.

[3] Brown-Eagle and Brown & Root were not interrelated.

[4] The bargaining unit specified in the Union contract was "all product handling employees currently or in the future who are employed by an employer at the CIBA Specialty Chemicals Corporation plant site in McIntosh, Alabama, including the warehouse, packaging and technical employees; excluding all other employees, including office clerical employees, professional employees, guards and supervisors."

B. The Expression of Prounion Sentiment and the Union's Demand for Recognition

The Respondent's takeover of the packaging and material handling operation was scheduled for June 10. On May 26 and 27, Outlaw and Gordon Sloat, the Respondent's project superintendent at McIntosh, held at least three shift meetings with Brown-Eagle's employees. At each of these meetings, Outlaw and Sloat encouraged all Brown-Eagle employees to submit employment applications. The credited evidence establishes that Outlaw made a number of statements at these meetings, and in conversations he had with individual employees, confirming that the Respondent wanted to hire as many Brown-Eagle employees as possible.

However, during at least two of these shift meetings, several employees asked Outlaw whether they would be able to keep their union if they became the Respondent's employees. According to the credited testimony of employees Baxter, Freeman, and Felicia Brown, Outlaw responded that "Brown & Root was a non-union company and was going to stay that way," and that "if the [Brown-Eagle] employees came to work for them they would be non-union."

On May 29, the Union mailed to the Respondent's corporate headquarters in Houston a written demand for recognition at the McIntosh facility. Enclosed with the letter were authorization cards signed by 54 Brown-Eagle employees, and union membership applications signed by 42.[5] The Respondent received this material on June 1. On June 2, the Union sent another set of its demand documents to the Houston office.

In addition, over the next few days at the McIntosh facility, Local 1657 Business Agent Donald Wright, Union Steward Baxter, and Brown-Eagle employee Jammie Mason attempted to give first Outlaw and then Sloat an envelope containing copies of the written recognition demand, cards, and applications. Outlaw and Sloat both refused to accept this material, and Baxter left it down on the receptionist's desk in the lobby area. Outlaw testified that the Respondent refused acceptance because "[w]e didn't have any dealings with . . . the people that were trying to deliver the package."

C. The Respondent's Hiring Decisions

On May 28, the Respondent posted an ad for packaging and material handling applicants in a local newspaper. This action was consistent with the terms of an agreement the Respondent had previously made with the U.S. Office of Federal Contract Compliance Programs (OFCCP) concerning the employment of minorities. Starting on May 29, after the shift meetings with Outlaw and Sloat, at least 66 of Brown-Eagle's 68 employees submitted written applications for employment with the Respondent. The Respondent also accepted applications from walk-in applicants and from its current employees.

Apart from its repeated statements of intent to hire Brown-Eagle employees, the Respondent had a written hiring policy that established preferences for job applicants. Under this policy, first priority was given to current Brown & Root employees; second priority to former employees; and third priority to applicants referred by a Respondent supervisor or employee.

From May 29 to June 10, the Respondent processed the applications it received. Most applicants were first given a written test in arithmetic, followed by a "structured" question-and-answer interview, and then a final interview with either Outlaw or Sloat.[6] Outside applicants were required to achieve a minimum score on the written test in order to be referred for the structured interview. All Brown-Eagle applicants, however, were referred for the interview regardless of their test scores because, Senior Human Resources Manager Rick Hopper testified, "they were already on the project performing the work."

Although some of the predetermined questions in the structured interview addressed aspects of the applicant's work experience and outlook (e.g., nature of assigned duties, initiative, and ambitions), none addressed packaging or material handling, the applicant's specific skills, or quality of recent work performance. Nor did the Respondent seek input from Brown-Eagle's supervisors (11 of whom it hired as supervisors) concerning Brown-Eagle applicants' qualifications.

By June 10 Outlaw and Sloat, who made all of the Respondent's final hiring decisions, had hired 77 employees. Only 17 of the 66 nonsupervisory Brown-Eagle applicants were among those hired; the 60 other new hires had not previously worked for Brown-Eagle. Outlaw's testimony confirmed that Brown-Eagle employees received no preference, notwithstanding the Respondent's previous statements of intent to hire as many of them as possible. Outlaw testified that this was because a new employee could be trained to perform most of the jobs in the unit "within a day."[7]

[5] A number of employees signed both documents.

[6] As the judge noted, the documentary evidence suggests that not all applicants who were hired were given the written test and/or the follow-up interview. Applicants also took physical agility and drug tests, but there is no indication that these screening variables affected the Respondent's hiring decisions with respect to the discriminatees.

[7] Outlaw testified that Brown-Eagle employees' individual job experience was "dealt with in that [earlier] structured interview," and that he therefore did not address it during his own interview with an applicant. However, as noted above, the structured interview did not address quality of actual work performance. Nor has the Respondent alleged

As the judge noted, 18 of the non-Brown-Eagle applicants who were hired had no packaging and material handling experience and were not entitled to any preference under the Respondent's written hiring policy. By contrast, 10 Brown-Eagle applicants who were not hired not only had applicable experience but were entitled to preference under that policy. On June 25, when the Respondent hired as many as 10 additional applicants, no former Brown-Eagle employee was hired.

D. The Imposition of New Terms of Employment

Immediately upon taking over the unit on June 10, the Respondent imposed new terms of employment.[8] The Respondent refused to negotiate with the Union over these changes and has to date refused to recognize the Union as the bargaining representative for the unit's employees.

Operation of the unit after the changeover continued much as before. Employees from the Respondent's construction and maintenance unit were occasionally assigned to perform packaging and material handling work, and the two work forces had common upper management and control. It is not disputed, however, that the packaging and material handling operation, its work schedules, and its functions and job classifications remained the same, and that the unit continued as a distinct operation with its own employees and supervisors.

II. "FUTILITY" OF ORGANIZING

The judge found from the credited evidence that Outlaw announced to the Brown-Eagle employees, in specific response to their questions about retaining their union, that the Respondent was a "non-union company" and "intended to stay that way." As the judge discussed, an employer violates Section 8(a)(1) by telling employees that it will remain nonunion. *Galloway School Lines,* 321 NLRB 1422, 1433 (1996). The judge, however, failed to make a specific finding that Outlaw's statements were unlawful. We correct this inadvertent error, and we will modify the recommended Order accordingly.

The Respondent contends that Outlaw stated only that the Respondent had "proposed the job on an open-shop basis," and that this was a permissible statement of objective fact under *P.S. Elliott Services*, 300 NLRB 1161 (1990). However, the judge discredited Outlaw's testimony and found that his statements went beyond those of the successor employer in *Elliott Services*, who stated only that his company was nonunion and committed no other unlawful actions. The decision is accordingly distinguishable.

III. REFUSAL TO HIRE

For the reasons cited by the judge, and in view of the additional evidence noted above, we agree that the General Counsel sustained his burden, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of showing that the Respondent refused to hire 48 former Brown-Eagle employees because of their association with or support of the Union, in violation of Section 8(a)(3) and (1).[9]

The Respondent's stated reason for not hiring the discriminatees was that they were determined to be unqualified or less qualified than the outside applicants who were hired. We agree with the judge that this rationale was a pretext, in light of the evidence cited by the judge. Moreover, there was no evidence that the Respondent's test/interview procedure—which did not address employees' actual work performance in any detail—elicited information that would have altered the Respondent's initial stated intent to hire most or all of the Brown-Eagle employees. On the contrary, the Respondent's notable failure to consult any of the 11 former Brown-Eagle supervisors whom it hired concerning the qualifications of Brown-Eagle applicants suggests that it neither sought nor acquired information which might have given rise to misgivings as to those employees' competence.[10]

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that it relied on Brown-Eagle personnel records in making its hiring decisions.

[8] The new terms included a different wage scale; elimination of double-time pay and reduced overtime; elimination of paid vacation for employees with less than 4 years' seniority; higher monthly co-premiums for medical coverage; elimination of some paid holidays; and a requirement that employees pay for their own safety equipment.

[9] Since there is no dispute that the Respondent filled enough actual vacancies to have hired all of the discriminatees, all of the discriminatees are entitled to reinstatement. We shall also modify the judge's recommended remedy by requiring the Respondent to make all delinquent benefit contributions or payments, in addition to backpay, and to reimburse employees for any expenses ensuing from its failure to make such payments.

The judge mistakenly omitted Clayton Davis, who was hired by the Respondent on October 12, from the list of employees whom he found suffered unlawful discrimination in June, but correctly included Davis in the list of dicriminatees in his recommended Order and notice.

The judge included employee Jeff Koen among the former Brown-Eagle applicants, but indicated that the Respondent could raise in compliance whether Koen actually worked for Brown-Eagle. The Respondent conceded in its exceptions that Koen was a Brown-Eagle employee.

We deny the General Counsel's exception with respect to employees Carla Foster and Cedrick Jackson because the judge found, on the basis of credited evidence, that neither followed up on his/her initial application for employment, and that their respective failures to be hired consequently did not result from unlawful discrimination.

[10] The fact that the Respondent did not require Brown-Eagle applicants to take the written test admittedly because "they were already on the project performing the work" also supports the inference that the Respondent had more confidence in the qualifications of those employees than in those of outside applicants.

Finally, the Respondent undermines its own assertion that the discriminatees were under-qualified by also contending in its exceptions that the jobs at issue were unskilled and could easily be filled by outsiders.[11]

IV. DUTY TO BARGAIN

We adopt the judge's findings that the Respondent was the successor employer at CIBA's packaging and material handling unit, and that the Respondent's refusal to bargain with the Union over the terms of employment for that unit accordingly violated Section 8(a)(5) and (1).

The Respondent merely replaced the former contract operator of a production unit owned by a third party. The production unit, as taken over from Brown-Eagle, remained virtually unchanged and had the same immediate customer (CIBA). After the operation changed hands, the unit's employees performed identical jobs under identical working conditions, under most of the unit's former supervisors. Former Brown-Eagle employees hired by the Respondent undoubtedly "view[ed] their job situations as essentially unaltered." *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 43 (1987).

As the judge noted with respect to appropriateness of the bargaining unit, the issue is not whether a new unit consisting of both of the Respondent's work forces at CIBA would be appropriate, but whether the original unit remained a separate appropriate unit after the successorship took effect. E.g., *Heritage Park Health Care Center*, 324 NLRB 447, 451 (1997), enfd. 159 F.3d 1346 (2d Cir. 1998). We agree with the judge that the original unit remained appropriate.[12] *Elliott Services*, supra, cited by the Respondent, is again clearly distinguishable. As discussed, after the successor employer in *Elliott Services* took over the predecessor unit "the employees became part of a highly integrated and centralized organization in which a single location [the predecessor] unit *could not* be appropriate for bargaining." *Banknote Corp. of America*, 315 NLRB 1041, 1044 fn. 8 (1994), enfd. 84 F.3d 637 (2d Cir. 1996), cert. denied 519 U.S. 1109 (1997) (emphasis added). Here, there is no contention that the functions of the Respondent's packaging and material handling unit were merged into the functions of its construction and maintenance operations or that the jobs in the two units became identical.

V. THE IMPOSITION OF INITIAL TERMS OF EMPLOYMENT

Contrary to the judge, we find that the Respondent was not privileged to impose the initial terms and conditions of employment on the unit employees.

In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Supreme Court established that a successor employer may "ordinarily" impose initial terms and conditions of employment at the outset, even if the successor is obligated to bargain with the union that represented the predecessor's employees. 406 U.S. at 281–294.[13] In *Burns*, however, the successor committed no unlawful conduct beyond refusing to recognize the union. Accordingly, "the *Burns* right to set initial terms and conditions of employment must be understood in the context of a successor employer that will recognize the affected unit employees' collective bargaining representative and enter into good-faith negotiations with that union." *Advanced Stretchforming International, Inc*., 323 NLRB 529, 530 (1997), enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000).

Where a successor has not only refused to bargain but has also attempted to evade its bargaining obligations by engaging in discriminatory hiring, the Board has refused to limit its analysis solely to an application of *Burns* as though such discrimination had no practical effect. See, e.g., *Daufuskie Island Club & Resort*, 328 NLRB 415, 422 (1999), enfd. mem. sub nom. *Operating Engineers Local 465 v. NLRB*, 221 F.3d 196 (D.C. Cir. 2000); *State Distributing Co*., 282 NLRB 1048, 1049 (1987). In that situation the successor's discrimination has "block[ed] the process by which the obligations and rights of such a successor are incurred," and the uncertainties as to who would have been hired and whether employees of the predecessor would have comprised a majority of the new unit had the successor acted lawfully are directly attributable to the successor's misconduct. *State Distributing Co*., supra. As a matter of equity, the Board resolves those uncertainties against the wrongdoer by presuming that the successor would have hired the predecessor's employees and bargained with the union, and by finding a violation of Section 8(a)(5) and (1). See id.; *Pacific Custom Materials,* 327 NLRB 75, 86 (1998); *Advanced Stretchforming*, 323 NLRB at 530; *Love's*

However, we do not rely, as did the judge, on the fact that the Respondent hired two outside applicants (Reco Campbell and Barbara Koen) whose test scores were at first incorrectly recorded as passing, while rejecting three Brown-Eagle applicants whose test scores were lower than the stated minimum. As noted above, all Brown-Eagle employees were referred for interviews regardless of their written test scores.

[11] We agree with the judge, however, that the Respondent's May 28 advertisement, posted in compliance with the Respondent's agreement with the OFCCP, does not support the inference that the Respondent's hiring decisions were based on union animus.

[12] We do not rely on *Irwin Industries*, 304 NLRB 78, 79 (1991), enf. denied 980 F.2d 774 (D.C. Cir. 1992), cited by the judge.

[13] *Burns* also confirmed that a successor is bound by the predecessor's terms of employment if it is "perfectly clear that the new employer plans to retain all of the employees in the unit." 406 U.S. at 294–295.

Barbecue Restaurant, 245 NLRB 78, 82 (1979), enfd. in relevant part sub nom. *Kallman v. NLRB*, 640 F.2d 1094, 1102–1103 (9th Cir. 1981).[14]

Even where a successor employer has not unlawfully refused to hire the employees of its predecessor, but has instead attempted to avoid its bargaining obligations by clearly communicating to those employees that they will not retain their union, the Board has found that the successor is not entitled to unilaterally alter the terms and conditions of employment. *Advanced Stretchforming*, supra. This is because such unlawful statements chill the employees' right to invoke the successor's bargaining obligations and thereby, like discriminatory hiring, "block the process by which the obligations and rights of such a successor are incurred." *Advanced Stretchforming*, 233 F.3d at 1181.

Here, as found above, the Respondent attempted to avoid its bargaining obligations by first telling the Brown-Eagle employees that it was "going to stay" nonunion and that "they would be non-union," and then by unlawfully refusing to hire most of them in order to make good its threat. We therefore find that the Respondent acted unlawfully in imposing new terms of employment on employees in the unit without bargaining with the Union.[15] Accordingly, in addition to requiring hiring and backpay for the discriminatees, we will require the Respondent to restore the terms and conditions of employment established by the Union's contract with Brown-Eagle at the time of the successorship, until the Respondent negotiates a new contract with the Union or negotiates to impasse.[16]

[14] Courts of appeals have approved the Board's approach. See *NLRB v. Advanced Stretchforming International*, 233 F.3d 1176, 1180–1181 (9th Cir. 2000), cert. petition filed June 7, 2001; *Capital Cleaning Contractors v. NLRB*, 147 F.3d 999, 1007–1109 (D.C. Cir. 1998); *Pace Industries v. NLRB*, 118 F.3d 585, 593–594 (8th Cir. 1997), cert. denied 523 U.S. 1020 (1998); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1467–1468 (9th Cir. 1996), cert. denied 522 U.S. 948 (1997); *NLRB v. Staten Island Hotel Ltd. Partnership*, 101 F.3d 858, 862 (2d Cir. 1996); *NLRB v. Horizons Hotel Corp.*, 49 F.3d 795, 806 (1st Cir. 1995); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1319–1323 (7th Cir. 1989) (en banc), cert. denied 503 U.S. 936 (1992); *Systems Management, Inc. v. NLRB*, 901 F.2d 297, 307 (3d Cir. 1990); and *American Press, Inc. v. NLRB*, 833 F.2d 621, 624–625 (6th Cir. 1987).

[15] It is irrelevant that the Respondent hired some of the Brown-Eagle employees. The unlawful discrimination against the other employees still had the intended effect of preventing the predecessor's employees from comprising a majority of the new unit. E.g., *Galloway School Lines*, supra, (successor was bound by pre-existing terms even though it hired more of the predecessor's employees than it unlawfully refused to hire); *U.S. Marine Corp*., 293 NLRB 669 (1989), enfd. 944 F.2d 1305 (7th Cir. 1989) (same).

[16] Requiring the Respondent to restore the terms of employment established by the Brown-Eagle contract until the Respondent negotiates a new contract with the Union or to impasse is consistent with our previous decisions, and with the equitable principle that an uncertainty created by the Respondent's own misconduct should be resolved against it. See, e.g., *State Distributing Co*., 282 NLRB at 1048–1050. Courts of appeals have enforced this requirement in similar cases. See *Operating Engineers Local 465 v. NLRB*, 221 F.3d 196 (enfg. *Daufuskie*); *Pace Industries v. NLRB*, 118 F.3d at 593–594; *NLRB v. Staten Island Hotel Ltd. Partnership*, 101 F.3d at 862; *NLRB v. Horizons Hotel Corp.*, 49 F.3d at 806; *U.S. Marine Corp. v. NLRB*, 944 F.2d at 1322–1323; *Systems Management, Inc. v. NLRB*, 901 F.2d at 307; and *American Press, Inc. v. NLRB*, 833 F.2d at 627. Cf. *NLRB v. Advanced Stretchforming International*, 233 F.3d at 1183–1184 (restoration of initial terms until successor negotiates new contract or to impasse is required unless successor shows through definitive evidence that it would not have agreed to the initial terms even if it had acted lawfully). But see *Capital Cleaning Contractors v. NLRB*, 147 F.3d at 1010–1012.

ORDER

The National Labor Relations Board orders that the Respondent, Brown & Root, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Stating or indicating to employees that the Respondent will not permit them to be represented by a labor organization.

(b) Refusing to hire former employees of its predecessor employer because of those employees' union or other protected activities, or in order to prevent those employees from being represented by a labor organization.

(c) Refusing to recognize and bargain in good faith with United Food and Commercial Workers Union, Local 1657, AFL–CIO as exclusive collective-bargaining representative for its employees in the below described bargaining unit:

> All product handling employees currently or in the future who are employed by an employer at the CIBA Specialty Chemicals Corporation plant site in McIntosh, Alabama, including the warehouse, packaging and technical employees; excluding all other employees, including office clerical employees, professional employees, guards and supervisors.

(d) Unilaterally changing wages, hours, and other terms and conditions of employment without first giving notice to and bargaining with United Food and Commercial Workers Union, Local 1657, AFL–CIO, about such changes.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, offer full and immediate employment in their former positions to the following employees at its McIntosh, Alabama facilities or, if such positions no longer exist, in substantially equivalent

positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging if necessary any employees hired in their place. If Respondent does not have sufficient positions available, the remaining employees shall be placed on a preferential hiring list.

(b) Make whole the following named employees for any loss of earnings and other benefits, plus interest, suffered as a result of the Respondent's unlawful refusal to employ them, in the manner set forth in the remedy section of the judge's decision, as modified by the Board's decision.

Sean Akridge	Andre' Love
Michael Allen	Jimmie Mason
William Anderson	Derrick Mitchell
Charles Baxter	Ernest Moss
Jimmy Beasley	Marcus Nettles
Patrick Beech	Lester Oliver
Ray Christen	Charles Presley
James Cooley	Sean Ratcliff
Clayton Davis	Jeff Koen
Stephanie Ervin	Kunta Reasor
Samuel Everett	Demarlo Reed
Joseph Freeman	Freddie Reed
Aaron Gardner	John Simpson Jr.
Collier Gardner	Dexter Sims
Kelvin Gould	Dannie Skeene
Jimmie Grayson	Stuart St. John
Lamark Herring	Billy Sullivan
Christopher Hill	Latson Sullivan
Kelvin Houston	Thad Taylor
Bettie Jackson	Carl Thomas
Eric Jackson	Patrick Thomas
Joseph Jackson	Heather Williams
Nathaniel Jackson	Thomas Williams
Renee' Jackson	Tony James

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire any of the above-named employees, and within 3 days thereafter notify these employees in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(d) Recognize and, on request, bargain collectively with the Union as the exclusive representative of the Respondent's unit employees, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed agreement.

(e) On request of the Union, rescind any departures from the terms and conditions of employment that existed immediately prior to the Respondent's takeover of the packaging and material handling unit at CIBA Specialty Chemicals Corporation, McIntosh, Alabama, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and make whole the bargaining unit employees by remitting all wages and benefits, plus interest, that would have been paid absent such unilateral changes from June 10, 1998, until it negotiates in good faith with the Union to agreement with the Union or to impasse. Nothing in this order shall be construed to authorize or require the Respondent to withdraw any improved condition or to result in the employees' loss of any beneficial unilateral change.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay and other compensation due under the terms of this order.

(g) Within 14 days after service by the region, post at its facilities in McIntosh, Alabama, copies of the notice attached as "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Re-

[17] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice "Posted by Order of the National Labor Relations Board'' shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

spondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 26, 1998.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 15, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT state or indicate to employees that we will not permit you to be represented by a union.

WE WILL NOT refuse to hire job applicants who worked for our predecessor employer in order to avoid a bargaining obligation with United Food and Commercial Workers Union, Local 1657, AFL–CIO, or with any other labor organization.

WE WILL NOT refuse to recognize and bargain in good faith with United Food and Commercial Workers Union, Local 1657, AFL–CIO as the Union for our packaging and material handling employees.

WE WILL NOT unilaterally change your wages, hours, and other terms and conditions of employment without first giving notice to and bargaining with United Food and Commercial Workers Union, Local 1657, AFL–CIO, about such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days of this Order, offer immediate and full employment to Sean Akridge, Michael Allen, William Anderson, Charles Baxter, Jimmy Beasley, Patrick Beech, Ray Christen, James Cooley, Clayton Davis, Stephanie Ervin, Samuel Everett, Joseph Freeman, Aaron Gardner, Collier Gardner, Kelvin Gould, Jimmie Grayson, Lamark Herring, Christopher Hill, Kelvin Houston, Bettie Jackson, Eric Jackson, Joseph Jackson, Nathaniel Jackson, Renee' Jackson, Tony James, Jeff Koen, Andre Love, Jimmie Mason, Derrick Mitchell, Ernest Moss, Marcus Nettles, Lester Oliver, Charles Presley, Sean Ratcliff, Kunta Reasor, Demarlo Reed, Freddie Reed, John Simpson, Jr., Dexter Sims, Dannie Skeene, Stuart St. John, Billy Sullivan, Latson Sullivan, Thad Taylor, Carl Thomas, Patrick Thomas, Heather Williams and Thomas Williams to jobs formerly held by each of them with predecessor employer Brown–Eagle at the packaging and material handling unit at CIBA Specialty Chemicals, Inc., McIntosh, Alabama, and WE WILL make them whole for any loss of earnings and other benefits resulting from our refusal to hire each of them, less any net interim earnings, plus interest, and WE WILL remove from our files any reference to our unlawful refusal to hire any of these employees, and notify these employees in writing that this has been done and that the refusal to hire them will not be used against them in any way.

WE WILL NOT recognize and bargain on demand with United Food and Commercial Workers Union, Local 1657, AFL–CIO, as exclusive collective bargaining representative of our below described employees:

> All product handling employees currently or in the future who are employed by us at the CIBA Specialty Chemicals Corporation plant site in McIntosh, Alabama, including the warehouse, packaging and technical employees; excluding all other employees, including office clerical employees, professional employees, guards and supervisors.

WE WILL, on request of the Union, rescind any changes from the terms and conditions of employment that existed immediately prior to our takeover of the packaging and material handling unit at CIBA Specialty Chemicals Corporation, McIntosh, Alabama, and retroactively restore the preexisting terms and conditions of employment, including wage rates and benefit plans, and make whole the bargaining unit employees by remitting all wages and benefits, plus interest, that would have been paid absent such unilateral changes from June 10, 1998, until we negotiate in good faith with the Union to agreement or to impasse.

BROWN & ROOT, INC.

Lesley A. Troup, Esq., for the General Counsel.
Howard S. Linzy, Esq. and *Thomas J. McGoey II*, *Esq*., of New Orleans, Louisiana, for the Respondent.
George L. Seiderfaden Sr., for the Charging Party.

DECISION

STATEMENT OF THE CASE

PARGEN ROBERTSON, Administrative Law Judge. This hearing was held from February 22–25, 1999, in Mobile, Alabama. The charge was filed on August 31, amended on November 24 and 30, and a complaint issued on December 31, 1998.

Respondent, General Counsel, and Charging Party were afforded full opportunity to be heard, to examine and cross–examine witnesses, and to introduce evidence. On consideration of the entire record and briefs filed by Respondent and General Counsel, I make the following findings

I. JURISDICTION

Respondent (oftentimes referred to as Brown & Root) admitted that it is a corporation with an office and place of business in McIntosh, Alabama, where it is engaged as a contractor furnishing production and maintenance services. It admitted that during the 12 months ending November 30, 1998, in conducting its business operations, it provided services valued in excess of $50,000 for CIBA Specialty Chemical Corporation (CIBA), an enterprise within the state of Alabama directly engaged in interstate commerce and it purchased and received goods valued in excess of $50,000 directly from points outside Alabama. It admitted that it has been an employer engaged in commerce within the meaning of section 2(2), (6), and (7) of the National Labor Relations Act (the Act), at all material times.

II. LABOR ORGANIZATIONS

Respondent admitted that the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act, at all material times.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

The General Counsel alleged that Respondent is a successor contractor for packaging and material handling at CIBA's McIntosh, Alabama location. Before Respondent, Brown-Eagle Contractors, Inc. (the alleged predecessor) performed that work.

Brown & Root performed various contract work other than packaging and material handling, from the construction of the CIBA facility in 1953. In those contracts it maintained a work force of 200 or more employees. The Brown & Root employees were not represented by a union.

Brown-Eagle was formerly the CIBA packaging and material handling contractor. The Charging Party (Union) represented the Brown-Eagle employees from around 1993.

Although their names are somewhat similar, there is no relationship between Brown & Root and Brown-Eagle.

The complaint alleged that Respondent unlawfully threatened employees, refused to hire employees formerly employed by Brown-Eagle, and failed to recognize and bargain with the Union as exclusive collective-bargaining representative of employees in the below described collective-bargaining unit. Those actions allegedly violate Section 8(a)(1), (3), and (5) of the Act.

> All product handling employees currently or in the future who are employed by an employer at the CIBA Specialty Chemicals Corporation plant site in McIntosh, Alabama, including the warehouse, packaging and technical employees; excluding all other employees, including office clerical employees, professional employees, guards and supervisors.

In May 1998 Brown-Eagle employed approximately 68 bargaining unit employees represented by the Union. Brown-Eagle's last collective-bargaining agreement with the Union was effective from February 1, 1997, until January 31, 2000 (GC Exh. 11).

On April 15, 1998, CIBA issued a request for proposals for the packaging and material handling contract. Although Brown-Eagle offered a bid, the new contract was awarded to Respondent on May 22, 1998.[1]

At least 64[2] of the 68 former Brown-Eagle unit employees[3] applied for work[4] with Respondent.[5] Respondent initially hired

[1] The packaging and material handling work was actually contracted through a modification to Brown & Root's existing contract with CIBA (R. Exh. 11).

[2] Respondent pointed out in its brief that BE on R. Exh.1, referred to former Brown-Eagle employees without a preference, while BB referred to former Brown-Eagle employees with a hiring preference, under Brown & Root's field hiring policy. Former Brown-Eagle employees identified as BE that applied but were not hired included Sean Akridge (Respondent conceded that Akridge was incorrectly shown as BE but was actually entitled to and did receive consideration as a BB), Michael Allen, William Anderson, Charles Baxter, Patrick Beech, Ray Christen, Stephanie Ervin, Samuel Everett, Carla Foster, Joseph Freeman, Aaron Garner, Kelvin Gould, Jimmie Grayson, Lamark Herring, Christopher Hill, Kelvin Houston, Bettie Jackson, Cedrick Jackson, Eric Jackson, Joseph Jackson, Nathaniel Jackson, Renee' Jackson, Tony James, Andre' Love, Derrick Mitchell, Ernest Moss, Marcus Nettles, Lester Oliver, Charles Presley, Demarlo Reed, Freddie Reed, Dexter Sims, Dannie Skeene, Stuart St. John, Billy Sullivan, Latson Sullivan, Thad Taylor, Carl Thomas, and Heather Williams. Former Brown-Eagle employees identified as BB that applied but were not hired included Jimmy Beasley, James Cooley, Collier Garner, Jimmie Mason, Sean Ratcliff, Kunta Reasor, John Simpson Jr., Patrick Thomas, and Thomas Williams (see Tr. 438–439).

Alleged discriminatee Terry Dean was not included on R. Exh. 1 and there was no other evidence showing that Dean submitted a job application. Therefore, I grant Respondent's request that I dismiss the allegations of unlawful refusal to hire Dean.

Alleged discriminatee Jeff Koen was included on R. Exh. 1 but was shown as an applicant other than a former Brown-Eagle employee (OT—Other without preference).

[3] Although former Brown-Eagle employees Carla Foster and Cedrick Jackson applied for work with Respondent, neither was ever available for an interview. I credit the undisputed testimony of Rick Hopper showing that Respondent tried unsuccessfully to call Foster and Jackson in for an interview. On the basis of that evidence I find that the allegations of unlawful refusal to hire Foster and Jackson are dismissed.

[4] As shown here, 48 former Brown-Eagle employees applied for work and were not hired. Eighteen former Brown-Eagle employees applied and were hired by Respondent (including Clayton Davis who was not hired until October 1998). Those figures show that a total of 66 former Brown-Eagle employees applied for work with Respondent.

[5] R. Exh. 1 shows 367 applicants for the initial packaging and material handling jobs. However, Timothy Adams was shown as having no application date and was hired on June 10; Zerrick Gaines was not

77[6] unit employees of which approximately 17[7] were former Brown-Eagle employees. In subsequent hirings Respondent did not hire any former Brown-Eagle employees until October 1998 when it hired one former Brown-Eagle unit employee (Clayton Davis).

Respondent also hired 14 unit supervisors. Eleven of those supervisors were formerly employed by Brown-Eagle (R. Exh. 1, p. 12).

A. The Alleged Refusal to Hire

As is oftentimes the case I shall first consider whether it was proven that Respondent refused to hire Brown-Eagle unit employees because of union animus. *Manno Electric*, 321 NLRB 278 fn. 12 (1996). Counsel for the General Counsel pointed to the following factors as proving that Respondent refused to hire former Brown-Eagle employees in violation of Section 8(a)(1) and (3):

(1) Respondent suggested to employees it would be futile for them to chose the Union; (2) Respondent hired many inexperienced employees while it refused to hire experienced former Brown-Eagle employees despite a need to accomplish a rapid and smooth changeover; (3) Respondent refused to follow its own field hiring policy by failing to initially hire 10 former Brown-Eagle experienced employees that were entitled to special hiring preference under its policy, while it hired 18 people that lacked experience and were not entitled to any special hiring preference; (4) Respondent hired 2 inexperienced employees that had not worked for Brown-Eagle and that had failed its battery of aptitude tests while it refused to hire 4 former Brown-Eagle employees that had failed the battery of aptitude tests; (5) Respondent advertised for job openings on and after June 25, 1998, while qualified former Brown-Eagle applicants remained available for work; (6) there was an obvious contrast between the high ratio of Respondent's supervisors hired that had formerly worked for Brown-Eagle, compared with a low ration of Respondent's employees that formerly worked for Brown-Eagle; and (7) there was an obvious pretextual nature of other excuses offered by Respondent for its failure to hire more former Brown-Eagle employees.

1. Respondent suggested to employees it would be futile for them to choose the Union

Bill Oulaw was Respondent's project manager. Gordon Sloat was their project superintendent. Outlaw and Sloat held meetings of the Brown-Eagle employees on May 26 and 27, 1998, regarding Brown & Root taking over the packaging and handling contract.

Former Brown-Eagle employee Joseph Freeman testified that he attended one of those meetings. The meeting was held at the CIBA facility in McIntosh. Outlaw told the employees they would have first chance at the Brown & Root jobs. Outlaw said that Brown & Root was a nonunion company and would not accept the Union. Another former Brown-Eagle employee, John Simpson Jr., testified about attending one of the meetings. Simpson testified that Outlaw and Sloat told the employees that Brown & Root was a nonunion company and there was a strong possibility that the people that were already working there would get their jobs back.

Felicia Brown worked for Brown-Eagle for over 3 years. She attended one of the meetings. Some employees at that meeting asked if the employees were going to keep their Union. Bill Outlaw responded no because Brown & Root was a nonunion organization and if the employees came to work for them they would be nonunion. Employee Charles Baxter asked if 50 percent of the people signed a union card would Brown & Root become union. Outlaw replied no that Brown & Root was nonunion and was going to stay that way.

Charles Baxter worked for Brown-Eagle and was a union steward. He attended a meeting at the CIBA Pavilion on May 27, 1998. Forty to 50 Brown-Eagle employees attended that meeting. Bill Outlaw explained that Brown & Root would try to hire people inside the plant. Outlaw said that they did not want to bring in new employees. Several employees asked questions and one asked if the employees would be able to keep "our union" if they were hired. Outlaw replied that Brown & Root was nonunion and they intended to stay that way.

Baxter also attended three other meetings conducted by Outlaw for other shifts. Baxter recalled that basically the same questions and statements came up during those meetings as in the first meeting he attended.

Bill Outlaw testified that he did hold meetings among Brown-Eagle employees on May 26 and 27, 1998. He testified

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shown to have an application date and was hired on June 10; Latara Jones applied on May 1 and was not hired; no application date was shown for Danny Thomas who was hired on June 10; Robert Williams was shown as having applied on April 30, and he was hired on June 10, 1998. That record shows that the applications for Latara Jones and Robert Williams were made before Respondent was awarded the packaging and material handling contract.

[6] Respondent pointed out in its brief that it hired or committed to hire 78 rank-in-file employees but included in that group was Clayton Davis who was not actually hired until October 1998 (R. Exh. 1).

[7] James Britton, Felicia Brown, James Chancey, Joel Clark, Edmund Franklin, Daisy Gamble, Joanne Heathco, Tammy Holmes, Voncille Holmes, Jerry Reed, Walter Rhodes, Hiedel Robertson, Michael Thomas, Billy Whigham, Clarence White, John Wiley, and John Woodyard were the former Brown-Eagle employees initially hired by Respondent. Clayton Davis, another former Brown-Eagle employee, was hired in October. Of those employees, as shown below in fn. 8, Respondent learned on June 1, 1998, that, James Britton had signed an authorization card and membership application, Felicia Brown signed an authorization card and membership application, James Chancey did not sign an authorization card or membership application, Joel Clark signed an authorization card, Edmund Franklin did not sign an authorization card but did sign a membership application, Daisy Gamble signed an authorization card, Joanne Heathco signed a membership application (and a Joann Heather signed an authorization card), Tammy Holmes did not sign an authorization card or a membership application, Voncille Holmes signed an authorization card, Jerry Reed signed an authorization card and membership application, Walter Rhodes did not sign an authorization card or a membership application, Hiedel Robertson signed an authorization card, Michael Thomas did not sign an authorization card but did sign a membership application, Billy Whigham (B.J. Whigham) signed an authorization card and membership application, Clarence White signed an authorization card and membership application, John Wiley signed an authorization card, John Woodyard signed an authorization card and membership application, and Clayton Davis signed an authorization card and membership application.

that the meetings were to inform the Brown-Eagle employees that Brown & Root would be performing the packing and handling services and would be interested in receiving job applications from those interested in applying. He admitted that the topic of the Union came up during the first meeting when he was asked if the employees were going to keep the Union. Outlaw testified that Brown & Root had proposed the job on an open-shop basis.

Additionally, Daisy Gamble testified about an orientation session Project Superintendent Gordon Sloat held with new employees. Sloat said there had been a lot flying around about union stuff. Sloat said that Respondent was a nonunion company and believed in brotherly love. He said that if anyone had a problem, the proper procedure was to go through the chain of command (Tr. 363–364).

On May 29 the Union wrote Respondent demanding recognition. Respondent received that letter on June 1, 1998.[8]

Credibility

As shown above, there is no dispute but that Bill Outlaw talked with Brown-Eagle employees about their opportunities for employment with Respondent. Outlaw admitted to holding meetings in order to include all the Brown-Eagle employees. Senior Human Resources Manager Rick Hopper also testified about the meetings. In view of the testimony and demeanor, I am convinced that Outlaw did assure the Brown-Eagle employees that Respondent planned to hire them for the bargaining unit positions and I am convinced that Outlaw warned those employees that Respondent would not recognize the Union. Respondent attacked the testimony of the General Counsel's employee witnesses especially that of Joseph Freeman, Felicia Brown, and Charles Baxter. Freeman did demonstrate some difficulty recalling all that occurred. Brown gave three prehearing affidavits and Respondent claimed her accounts of the meetings in those affidavits were inconsistent.

However, none of the testimony by Freeman, Simpson, Brown, and Baxter is in serious conflict with the testimony of Bill Outlaw. Rick Hopper's testimony was similar to Outlaw's but in some respects such as the length of the first meeting, their testimony was in conflict. In addition to concern about demeanor, I am concerned with the fact that even though Bill Outlaw admitted that at least of Respondent's people took notes during the first meeting, no writings were produced pursuant to the General Counsel's subpoena. I find it strange that Outlaw retained no notes and there was no explanation as to why notes admittedly taken, were not produced.

I am convinced that an accumulation of the credited evidence shows that Outlaw informed the employees that Respondent planned to hire the Brown-Eagle employees and not to hire others, and that Outlaw told those same employees that Respondent would not recognize the Union. I do not credit Outlaw's testimony to the extent it conflicted with that evidence. Bill Outlaw testified under 611(c) examination by counsel for the General Counsel in response to specific leading questions as to those meetings. He admitted that the topic of the Union did come up and he recalled that he told the employees that Brown & Root bid the job on an open-shop basis. He also admitted that an employee asked about 50 percent of the employees signing union cards.

Conclusions

Project Manager Outlaw admitted that he told the Brown-Eagle employees that Brown & Root wanted them to apply for the Brown & Root jobs. He admitted that an employee asked if the employees were going to keep the union and he replied that Brown & Root had proposed the job on an open-shop basis. However, a number of witnesses recalled that Outlaw made stronger comments regarding both job opportunities and how Respondent would deal with any union threat. As shown above, I find those witnesses were credible.

As to job opportunities, Joseph Freeman testified that Outlaw told the Brown-Eagle employees they would have first chance at the Brown & Root jobs. John Simpson Jr. recalled that Outlaw told the employees there was a strong possibility that the people would get their jobs back. Charles Baxter testified that Outlaw said Respondent would try to hire people inside the plant and that Brown & Root did not want to bring in new employees.

As to the question of how Brown & Root would deal with the Union, John Freeman testified that Outlaw said that Brown & Root was nonunion and would not accept the Union. John Simpson, Jr. also recalled Outlaw saying that Brown & Root was nonunion. Felicia Brown recalled that some of the Brown-Eagle employees asked Outlaw if they would be able to keep their union. Outlaw responded no because Brown & Root was a nonunion organization. When Outlaw was asked if 50 percent of the employees signed union cards would Respondent become union, he replied no that Brown & Root was nonunion

[8] As shown here, Respondent received the Union's first bargaining demand on June 1. Along with the demand letter the Union enclosed authorization cards and union membership applications signed by Brown-Eagle employees. The authorization cards were signed by the following employees:

> Freddie Reed, Ellen Johnson, Patricia Beech, Thad Taylor, Collier Gardner, Voncille Holmes, Jamie Mason, Latson Sullivan Jr., Heather Williams, Jammie Grayson, Clarence White, Sherry Ross, Samuel Brown, Sean Radcliff, Samuel Everett, Charles Baxter James Britton, B.J. Whigham, Kevin Gould, Joann Heather, John Woodyard, John Wiley, Stuart St. John, John Simpson Jr., Terry Dean, Christopher Hill, Daisy Gamble, William Anderson, Nathaniel Jackson, Jimmy Beasley, Thomas Williams, Ernest Moss, Derrick Mitchell, James Carpenter, Marcus Nettles, Bruce Grayson, Kelvin Houston, Eric Jackson, Tony James, Carl Richardson, Joel Clark, Carla Foster, Heidel Robertson, Jeffrey Brown, Vicky Robertson, Patrick Thomas, Carl Thomas, Scottie Arkridge, Aaron Gardner, Renee Jackson, Felicia Brown, Clayton Davis Jr., Jerry Reed, and Demarlo Reed.

Membership applications were enclosed which had been signed by the following employees:

> Charles Baxter, Jammie Mason, John Woodyard, James Britton, Thomas Williams, Heather Williams, Clarence White, Billy Whigham, Michael Thomas, Carl Thomas, Thad Taylor, Billy Sullivan, Stuart St. John, John Simpson, Dexter Sims, Dannie Skeene, Jerry Reed, Kunta Reasor, Sean Ratcliff, Charles Presley, Lester Oliver, Andre' Love, Jeff Koen, Tony James, Renee Jackson, Bettie Jackson, Jo Ann Heathco, Collier Gardner, Aaron Gardner, Edmund Franklin, Joseph Freeman, Samuel Everett, Stephanie Ervin, Terry Dean, Clayton Davis, Ray Christen, James Cooley, Terry Carney, Felicia Brown, Patricia Beech, Jimmy Beasley, and Michael Allen.

and was going to stay that way. Charles Baxter also testified that Outlaw told the Brown-Eagle employees that Brown & Root was nonunion and intended to stay that way.

The Board has found that an employer violated Section 8(a)(1) by telling employees that it was nonunion, that laid-off employees would be rehired but there would be no union and that the employer could hire only a certain percentage of old employees because Texas (i.e., that employer's parent company) did not want the Union and was afraid the employees would vote the union back in. *Pacific Custom Materials*, 327 NLRB 75 (1998). See also *Kessel Food Market*, 287 NLRB 426 (1987), enfd. 868 F.2d 881 (6th Cir. 1989), cert. denied 493 U.S. 820 (1989); and *Ryder Truck Rental,* 318 NLRB 1092, 1094 (1995), cited by the General Counsel. Respondent discussed *Kessel*, along with *Western Plant Services*, 322 NLRB 183 (1996), and *P.S. Elliott Services*, 300 NLRB 1161, 1162 (1990), in its brief.

In weighing the significance of Outlaw's comments, it is important to consider all the circumstances. Outlaw was the high–ranking Respondent official at the CIBA site. Production Manager Outlaw spoke to all the unit employees at a time when Respondent was in a position of hiring or rejecting those employees. Outlaw along with Production Superintendent Sloat, made those hiring decisions.

Previously, in Respondent's May 8, 1998 bid for the packaging and material handling contract, Outlaw informed CIBA that it was Respondent's intent to "provide for the continuity of services through the employment of as many of the current personnel as is deemed practical." He went on to state that "Brown & Root understands the benefits of using a large portion of the existing Material Handling work force and their immediate supervisors[9] to provide continuity of that service and it is our plan to do so." (GC Exh. 10.) Outlaw also advised CIBA, in a May 14, 1998 letter,[10] of Respondent's intent to handle its packaging and material handling contract with a "minimal employee turnover" and an intent "to hire a significant number of the existing work force" (GC Exh. 7).

2. Respondent hired many inexperienced employees while it refused to hire experienced former Brown-Eagle employees despite a need to accomplish a rapid and smooth changeover

As shown above, Respondent advised CIBA that it intended to hire a significant number of Brown-Eagle unit employees in order to accomplish a smooth changeover. Nevertheless, of the 66 former Brown-Eagle employees that applied for work with Respondent, it initially hired only 17 even though it initially started with 76 rank-in-file employees. The General Counsel argued that Respondent's asserted grounds for hiring 58 applicants without packaging and material handling experience were specious. In that regard Respondent claimed during the hearing that the packaging and material handling jobs were low-skill positions and suitable to being manned by an inexperienced work force. However, Respondent's bid and subsequent response to CIBA's request for clarification of the bid, illustrated that was not Respondent's belief 1 month before it started operations.[11] Then Respondent expressed to CIBA its intent to accomplish a smooth takeover by hiring Brown-Eagle employees and that it would hire from outside sources only in the event a large number of Brown-Eagle employees did not apply for work with Respondent.[12] See *Weco Cleaning Specialists*, 308 NLRB 310 (1992).

3. Respondent's refusal to follow its own field hiring policy[13] by failing to initially hire 10 former Brown-Eagle experienced employees that were entitled to special hiring preference under its policy, while it hired 18 people that lacked experience and were not entitled to any special hiring preference

Under Respondent's field hiring policy, preference in hiring is given (1 and 2) to current and former employees; and (3) to applicants referred by supervisors and current employees (GC

[9] As shown here, Respondent did hire a majority of its packaging and handling supervisors from former Brown-Eagle employees.

[10] CIBA faxed Respondent on May 12 with several requests regarding its bid on the packaging and material handling job. Those requests included a request for more information on Respondent's transition plan and one as to how Respondent would handle pay and benefits if it hired existing (Brown-Eagle) personnel. Bill Outlaw responded on May 14. Among other things he stated regarding the transition plan, that "we feel with minimal employee turnover and cooperation of the current contractor [Brown-Eagle], this timeframe can be shortened and Brown & Root can take full responsibility before the sixth week"; and also "Brown & Root plans to hire a significant number of the existing work force [i.e. Brown-Eagle employees] to assure a smooth changeover." In regard CIBA's inquiry as to pay, Outlaw replied among other comments, that it was Respondent's intent "to award a minimum fifty-cent increase above whatever the hourly production workers current wage is." Outlaw's comments regarding benefits included the following, "When these individuals [employees of Brown-Eagle] become Brown & Root employees they will earn vacation based on the credited service requirements of the Brown & Root Plan." In response to yet another inquiry from CIBA, Outlaw stated among other things, "we believe that we may be able to reduce the current staffing level by as many as five people without detrimentally impacting the services and thereby reduce overhead costs proportionally." (See GC Exh. 7.)

[11] Respondent argued in its brief that the job duties were not complex and required no previous experience. However, as shown above, that does not accord with Respondent's view at the time as shown in its correspondence to CIBA.

[12] The General Counsel argued that Respondent couldn't justify its hiring employees without experience with the argument that it was trying to comply with affirmative action mandates. The General Counsel pointed out at fn. 34 of his brief, Respondent could have satisfied those mandates by hiring former Brown-Eagle employees including 3 black females, 23 black males, and 3 white females (GC Exhs. 18, 23, and 34). On the other hand, Respondent argued that regardless of the makeup of Brown-Eagle minorities and female employees, it was required by the OFCC to advertise for new employees. However, Respondent's argument regarding its advertising requirements does not go to the issue here, which deals with actual hiring. Regardless of any advertising requirements there was no showing that Respondent was required to hire anyone other than former Brown-Eagle employees.

[13] Respondent argued that its field hiring policy was entirely lawful. However, it appears from the General Counsel's complaint and brief, that is not the point. Instead the General Counsel contends that Respondent failed to follow its own policy in order to discriminate. Whether Respondent's published policy is lawful on its face, does not bear on that question.

Exh. 36). Project Manager Outlaw testified that preference was given to all applicants who listed as referred by or related to, a current or former Brown & Root supervisor or employee. Nevertheless, Respondent initially hired 18 applicants with no packaging and material handling experience that were not entitled to a preference[14] while 10 former Brown-Eagle employees that were entitled to a preference,[15] were not hired (R. Exh. 1). After the initial hiring Respondent continued to deny employment to the 10 former Brown-Eagle employees when it filled jobs on June 25, 1998.

4. Respondent hired two inexperienced employees that had not worked for Brown-Eagle and that had failed its battery of aptitude tests while it refused to hire four former Brown-Eagle employees that had failed the battery of aptitude tests

Respondent allegedly refused to hire former Brown-Eagle employees Kelvin Houston, Lester Oliver, Freddie Reed, and Latson Sullivan because those applicants failed to pass its aptitude test.[16] However, Respondent hired two applicants that also failed the aptitude test. Those two applicants were Reco Campbell and Barbara Koen and neither had worked for Brown-Eagle. Senior Human Resources Manager Rick Hopper testified that Campbell and Koen's test scores were incorrectly calculated to originally show that each of them had passed their EAS (aptitude) tests (R. Exh. 1 and GC Exh. 15).[17] Hopper admitted that Campbell and Koen actually failed those tests (see also GC Exhs. 51 and 52).

5. Respondent advertised for bargaining position openings on and after June 25, 1998, while qualified former Brown-Eagle applicants remained available for work

As shown above, Respondent met with Brown-Eagle employees on May 26 and 27 and told those employees they would have first chance at the Brown & Root jobs; there was a strong possibility the people would get their jobs back; that Respondent would try to hire people inside the plant and that Brown & Root did not want to bring in new employees. Nevertheless, on May 28, 1998, Respondent advertised for packaging and material handling employees.[18] As to this argument, the record supports Respondent. Respondent was required to advertise under affirmative action requirements. Therefore, I am not persuaded that by advertising for jobs at a time when Brown-Eagle applicants were available for work, Respondent demonstrated its unlawful intent to avoid hiring Brown-Eagle applicants.

6. The contracts between the high ratio of Respondent's supervisors hired that had formerly worked for Brown-Eagle, compared with a low ration of Respondent's employees that formerly worked for Brown-Eagle

As shown above, 11 of the 17 initial supervisors were formerly employed by Brown-Eagle. As to the rank-in-file employees, only 17 of 74 initial employees were formerly employed by Brown-Eagle. Counsel for the General Counsel pointed to *NLRB v. Foodway of El Paso*, 496 F.2d 117, 119 (1974), for the proposition that retention of former managers but not unit employees made no business sense.

Respondent argued that its hiring of Brown-Eagle employees into supervisory positions proved nothing. In fact, it argued that there were very few applicants other than former Brown-Eagle employees, from which to choose. Brown-Eagle employees represented 70 percent of the supervisor applicants (14 of 20). There was only one referral from newspaper ads and there were three transferees from other Brown & Root positions. On the other hand former Brown-Eagle employees made up only 18 percent of the applicants for the nonsupervisory positions (66 out of 367).

7. The pretextual nature of other excuses offered by Respondent for its failure to hire more former Brown-Eagle employees

The General Counsel argued that the full record demonstrated that Respondent's asserted bases for refusing to hire more of the Brown-Eagle employees was nothing more than pretext. I agree. As shown here, Respondent did engage in pretext in order to disguise its true reason for refusing to hire former Brown-Eagle employees.

In view of my findings here, the General Counsel did prove (1) that Respondent told the Brown-Eagle employees of its intent to hire them and that it would not recognize their Union; (2) Respondent hired many inexperienced employees while it refused to hire experienced former Brown-Eagle employees; (3) Respondent failed to follow its field hiring policy in rejecting 10 former experienced Brown-Root employees with hiring preferences while it hired 18 inexperienced applicants without hiring preferences; (4) Respondent hired 2 inexperienced applicants without hiring preferences that failed the NAS while it refused to hire 4 experienced former Brown-Eagle employees that failed the NAS; and (7) Respondent engaged in pretext in an effort to justify its failure to hire former Brown-Eagle employees.

[14] Those 18 applicants were:
Tony Black, Dennis Blocker, Glenn Bryant, Jeffrey Carter, Charles Cassady, John Henson, Mary Jackson, Derrick Jones, Lonnie Kittler-Gary McDonald, Steve Mosely, Matt Oktay, Lonnie Powell, Rita Raine, Jim Rivers, Terry Robinson, Harold Trimnal, and Thalmas Williams.

[15] The 10 former Brown-Eagle employees that were entitled to a preference are:
Jimmy Beasley, James Cooley, Clayton Davis, Collier Gardner, Steward Mason, Sean Radcliff, Kunta Reasor, John Simpson, Patrick Thomas, and Thomas Williams.

[16] The test was pass/fail with a passing score of 65 (Tr. 603, 633). Kelvin Houston scored 47, Lester Oliver 64, Freddie Reed 57 and Latson Sullivan 54.

[17] Respondent also argued that it did not hire anyone that scored less than three on the structured interview. However, R. Exh. 1 shows that one applicant, Michael Jones, with a reference code of EE (showing that he was neither a former Brown-Eagle or Brown & Root employee), was shown to have no score on his EAS or on a structured interview. Nevertheless, Jones was hired on June 10, 1998. In view of that evidence I cannot credit Hopper's testimony that only applicants with structured interview scores of three or higher were referred for final interview. I deny Respondent's request that I dismiss the allegations of refusal to hire former Brown-Eagle employees Anderson, Beech, Ervin, Jackson, Oliver, Demarlo Reed, Freddie Reed, Sullivan, and Taylor.

[18] As shown above, Respondent argued that it was required by the OFCC to advertise for new employees.

In addition to the factors identified by the General Counsel, an examination of the calendar of events appears to be helpful. On May 8 Respondent submitted a bid on the packaging and material handling contract. That bid was supplemented by a May 14 letter from Respondent. CIBA awarded the contact to Respondent on May 22. On May 26 and 27 Respondent met with the Brown-Eagle employees. During those meetings Respondent through Bill Outlaw, assured those employees of Respondent's desire to hire them for its upcoming packaging and material handling jobs. However, several employees asked questions about whether they would retain their Union. Outlaw told those employee that they could not continue to be represented by the Union.

Those Brown-Eagle employees submitted 66 job applications with Respondent beginning on May 29. On June 1 Respondent received the Union's May 29 demand for recognition.[19] Also on June 1 agents of the Union hand-delivered a recognition demand to Respondent at the CIBA McIntosh facility.[20] The Union's bargaining demands included authorization cards and membership applications showing that a substantial majority of the Brown-Eagle employees supported the Union. On June 8 the Union filed a representation petition with the NLRB regional office (GC Exh.16). Respondent assumed the packaging and material handling operations on June 10 with a work force of 76 regular unit employees. Only 17 of those employees had worked for Brown-Eagle.

The Union filed the current unfair labor practice charges on August 31. In October Respondent hired one additional Brown-Eagle employee. No Brown-Eagle employees have been hired since October.

The General Counsel has the burden of proving that the employers were motivated to refuse to hire former Brown-Eagle employees because of union or other protected activities. See *Galloway School Lines*, 321 NLRB 1422 (1996); *Manno Electric*, 321 NLRB 278 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

Where job applicants were told that the employer was not union, would never be union and that the employer would not hire union, that evidence supported a reasonable inference that the employer conducted its hiring in a manner precluding the predecessor's employees from being a majority. In that case the Board found the employers had engaged in conduct in violation of Section 8(a)(1), (3), and (5). See *Galloway School Lines*, supra.

Here, the credited evidence shows that Respondent told both CIBA and the former Brown-Eagle employees that it planned to hire those employees to man its packaging and material handling operations. However, by employee comments and questions during May 26 and 27 meetings as well as actions by the Union shortly before and after June 1, Respondent learned that there was a likelihood that the Brown-Eagle employees wanted to retain the Union as their bargaining representative. Respondent threatened that it would be futile to select the Union and that it was nonunion and would remain that way. Immediately thereafter, before June 10, Respondent decided to hire only a minority[21] of its packaging and material handling employees from the Brown-Eagle bargaining unit.[22] Under those circumstances I find that the General Counsel proved that Respondent refused to hire former Brown-Eagle employees because of their union activities and membership and "in order to ensure that a majority of the employees in the new unit were not employees of the predecessor." *Galloway School Lines*, supra.

I shall also consider whether Respondent would have refused to hire former Brown-Eagle employees in the absence of their union activities and membership. *Wright Line*, supra; *NLRB v. Transportation Management Corp*., supra.

As shown here, I rejected Respondent's arguments that the evidence did not show that it was motivated to reject Brown-

[19] Respondent pointed to Hopper and Outlaw's testimony that neither of them knew of the contents of the Union's bargaining demands and enclosed application and membership cards. However, the evidence established that Respondent received copies of those documents on June 1 by both mail and hand-delivery and again by mail on June 3. In consideration of that evidence and Hopper and Outlaw's respective demeanor, I do not credit their testimony in that regard. I conclude from that evidence that Respondent, including Hopper and Outlaw, was aware of the demand and the application and membership cards. *Stevens Pontiac–GMC Inc*., 295 NLRB 599 fn. 5 (1989); *Honda of San Diego*, 254 NLRB 1248, 1268 (1981).

[20] As shown above, I do not credit testimony that would tend to show that its decisionmakers at McIntosh did not know of the Union's request for recognition and the enclosed authorization and membership cards. There is no dispute but that Respondent received the Union's demand in Houston on June 1 and that the Union delivered a copy of its demand to Respondent's CIBA facility. Bill Outlaw admitted talking about the Union's bargaining demand.

Respondent argued that its senior human resources manager never opened the Union's package, which was delivered to the Brown & Root trailer in McIntosh. As shown here, the evidence regarding Respondent's knowledge of the Union's quest to continue representing unit employees is substantial. In addition to evidence showing that the Union submitted two demands to Respondent in Houston, Texas, and one to its trailer at the CIBA facility, the record shows that the Union filed a representation petition with the NLRB Regional Office on June 8. Respondent's project manager admitted that employees asked him if they would keep their Union during his May 26 and 27 meetings with the Brown-Eagle employees. The comments by the employees made it apparent that numerous employees wanted to keep the Union. Included in the Union's demands received by Respondent before it hired any employees at CIBA were union authorization cards and union membership applications signed by specific Brown-Eagle employees. The employees that signed those cards and applications constituted a majority of the Brown-Eagle bargaining unit and, if those employees had been hired, would have constituted a majority of Brown & Root's packaging and material handling employees.

[21] Respondent argued that the record failed to show that it considered any applicant's union affiliation in deciding against hiring. However, as argued by the General Counsel and as shown here, the evidence did show that Respondent was motivated to insure that a majority of its unit employees did not come from the unionized Brown-Eagle work force.

[22] Respondent argued that it hired a greater percentage of former Brown-Eagle employees than it hired from any other source. Regardless of the merits of that argument, the record evidence supports a determination that Respondent was motivated to hire less than a majority of its employees from the former Brown-Eagle employees that were represented by the Union.

Eagle applicants in order to ensure that the Union did not represent a majority of its packaging and material handling employees. My findings illustrate factual support for the General Counsel's position and also, show that Respondent would not have refused to hire a majority of the former Brown-Eagle employees in the absence of a majority of its employees being represented by the Union.

Other specific questions were shown to demonstrate that Respondent failed to show its refusal to hire was without discriminatory intent. Four former Brown-Eagle employees failed to pass their EAS test. However, two applicants that had not worked for Brown-Eagle also failed to pass their EAS test but were hired.[23] Moreover, Respondent conceded that it did not eliminate any former Brown-Eagle appellant from the structured interview because of the EAS test score (Tr. 603–604, GC Exh. 41). Respondent also argued that it required all applicants to score three or above on the structured interview. Former Brown-Eagle employees Anderson, Beech, Ervin, Joseph Jackson, Oliver, Demarlo Reed, Freddie Reed, Sullivan, and Taylor failed to score three or above. However, as noted above the evidence gained from Respondent's records show that applicant Michael Jones was shown to have no score on his EAS or structured interview but was hired. Jones had not worked for Brown-Eagle.

Respondent argued that it received 124 applicants from non-Brown-Eagle employees, who had either worked for Brown & Root or had been referred by Brown & Root employees (R. Exh. 1). Those employees were identified as EE and received preferred consideration under Respondent's field hiring policy. Forty-two of those employees were hired. I am convinced that Respondent hired those employees under pretext in view of the credited evidence that Respondent assured both CIBA and the Brown-Eagle employees of its intent to hire those employees ahead of others (see above). Moreover, as shown here, the record illustrated that Respondent frequently failed to follow the field hiring policy. Despite the fact that some former Brown-Eagle employees with a hiring preference under that policy were not hired, other applicants were hired even though some of those applicants did not have a hiring preference.

In view of that evidence I find that Respondent failed to show that it would have refused to hire the alleged discriminatees absent its intent to avoid a bargaining obligation with the Union. I find that Respondent refused to hire the alleged discriminatees in violation of Section 8(a)(1) and (3) of the Act.

B. The Refusal to Bargain Allegations

The Alleged Refusal to Recognize

As shown above, the General Counsel alleged that Brown & Root is a successor employer to Brown-Eagle; that it refused to recognize the Union and that it made illegal unilateral changes in working conditions. Both Brown & Root and Brown-Eagle have provided services under contract with CIBA for several years. Brown-Eagle held the packaging and material handling contract from 1990 until June 1998. Brown-Eagle employed over 70 employees. The Union represented the below-described unit employees at the time CIBA terminated Brown-Eagle's contract:

> All product handling employees currently or in the future who are employed by an employer at the CIBA Specialty Chemicals Corporation plant site in McIntosh, Alabama, including the warehouse, packaging and technical employees; excluding

[23] Those two applicants were Rico Campbell and Barbara Koen. Respondent called Rick Hopper who testified those two test scores must have been totaled incorrectly.

all other employees, including office clerical employees, professional employees, guards and supervisors.

The most recent collective-bargaining contract between the Union and Brown-Eagle was effective from February 1, 1997, until January 31, 2000.

CIBA Purchasing Manager Jim Lamendola negotiates and signs contracts with subcontractors at the McIntosh site. CIBA manufactures chemicals that go into other products. Some of the chemicals used by CIBA including chlorine and hydrogen, are dangerous.

On May 22, 1998, CIBA awarded the contract formerly held by Brown-Eagle to Brown & Root. Sixty-six former Brown-Eagle employees applied for work with Brown & Root. Brown & Root initially hired 76 regular employees of whom 17 were formerly employed by Brown-Eagle in unit jobs. As shown above the General Counsel alleged that Brown & Root unlawfully refused to hire 42 former Brown-Eagle employees.

The Union demanded recognition[24] but Brown & Root refused to recognize and bargain.[25] In view of my findings that Respondent illegally refused to employ former Brown-Eagle unit employees (*Kessel Food Market*, 287 NLRB 426, 429 (1987), enfd. 868 F.2d 881 (6th Cir. 1989), cert. denied 493 U.S. 820 (1989), I conclude that but for its unfair labor practices a majority of its unit employees would have supported continued representation by the Union.[26] *Galloway School Lines*, supra; *Capital Cleaning Contractors v. NLRB*, 147 F.3d 999, 1008 (D.C. Cir. 1998). As shown above, I base that finding in large measure on the evidence showing that Respondent expressed on more than one occasion, an intent to retain the former Brown-Eagle employees. Afterward it became clear there was a likelihood that retention of those employees would also carry a likelihood that the Union would continue as their exclusive collective-bargaining representative. From that point Respondent proceeded to hire in a manner that avoided the possibility of having a majority of its unit made up of former Brown-Eagle unit employees.

The Board in *Bronx Health Plan*, 326 NLRB 810 (1998),[27] held that the key consideration in determining successorship is "whether it may reasonably be assumed that, as a result of transitional changes, the employees' desires concerning unionization (have) likely changed." Once it has been determined that the alleged successor has hired a sufficient number of former employees to constitute a majority of the purchaser's employee complement in an appropriate unit, the Board considers such circumstances as whether there has been a long hiatus in operations,[28] a change in product line or market, or a change of location or scale of operations. (See also *Commercial Forgings Co.*, 315 NLRB 162 (1994)). The Board pointed to *NLRB v. Burns Security Service*, 406 U.S. 272 (1972), as setting forth the criteria for determining whether a new employer is the successor to a prior employing entity. Those criteria are based on the totality of the circumstances of each case and the focus should be upon whether there is a "substantial continuity" between the alleged predecessor and successor employers; and whether a majority of the new employer's employees had been employed by the predecessor. The Board also pointed to a subsequent Supreme Court decision. In *Fall River Dyeing Corp. v. NLRB*, supra, the Court pointed to the following factors: (1) whether the business of both employers is essentially the same; (2) whether the employees of the new employer are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new entity has the same production process, produces the same products and basically has the same body of customers. The Court also stated that the Board will analyze the above factors primarily from the perspective of the employees, that is "whether 'those employees who have been retained will . . . view their job situations as essentially unaltered.'" The Board also cited its decision in *Mondovi Foods Corp*., 235 NLRB 1080, 1082 (1978), for showing that the key consideration is "whether it may reasonably be assumed that, as a result of transitional changes, the employees' desires concerning unionization have likely changed." The Board went on "Once it has been found that the purchaser has hired a sufficient number of former employees of the seller to constitute a majority of the purchaser's employee complement in an appropriate unit, the Board 'considers such circumstances as whether or not there has been a long hiatus in resuming operations, a change in product line or market, or a change of location or scale of operation.'"

Brown & Root never did hire enough former Brown-Eagle employees to constitute a majority. The General Counsel contends that but for Respondent's unlawful refusal to hire former Brown-Eagle employees there would have been a majority hired by Respondent. As shown above, I find in agreement with the General Counsel. The evidence shows that Respondent refused to hire applicants from the Brown-Eagle work force in an effort to avoid recognition of the Union. *Galloway School Lines*, 321 NLRB 1422 (1996).

Also critical "to a finding of successorship is a determination that the bargaining unit of the predecessor employer remains appropriate" *Banknote Corp. of America*, 315 NLRB 1041 (1994). Here, there was no hiatus in operation, no change in product line or market and no change in location. Respondent continued packaging and material handling operations under a contract with CIBA in the same manner formerly performed by the predecessor employer. In that regard it engaged in the same services to the same customer while using the same equipment

[24] As shown above the Union wrote a demand letter dated May 29 and included authorization cards and membership applications, illustrating that it represented a majority of the employees in the Brown-Eagle bargaining unit. Respondent never hired a majority of those former Brown-Eagle employees.

[25] The Board's continuing demand rule was approved by the Supreme Court in *Falls River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987). That rule provides that a union's premature demand for recognition, although rejected by the employer, continues in effect until the successor employer acquires a "substantial and representative complement" of employees. *Simon DeBartelo Group*, 325 NLRB 1154 (1998).

[26] See cases cited by the General Counsel including *NLRB v. Houston Distribution Services*, 573 F.2d at 267, quoting *NLRB v. Foodway of El Paso*, 496 F.2d at 120.

[27] See also *Simon DeBartelo Group*, supra.

[28] See *Straight Creek Mining*, 323 NLRB 759 (1997), where the Board found a successorship even though there was a 54-month hiatus in operations.

and same production procedure. *NLRB v. Security-Columbia Banknote Co.*, 541 F.2d 135 (3d Cir. 1976). Moreover, 11 of Respondent's 14 packaging and material handling supervisors were formerly employed by Brown-Eagle.

Respondent argued that only a unit that included all its employees at CIBA would be appropriate. In consideration of that argument it is important to avoid focusing on whether the overall unit would be appropriate. Instead I must consider whether the former bargaining unit continues to be appropriate. An overall unit may also be appropriate but that question is immaterial to the complaint allegations. The Board is not required to select a particular appropriate unit over another and is not required to even select the most appropriate unit. *Bry-Fern Care Center, Inc. v. NLRB*, 21 F.3d. 706 (6th Cir. 1994). Regardless of whether other units within Respondent's operation are or are not appropriate, the appropriateness of a unit must be determined on the basis of factors unique to that unit. The Board followed that reasoning in *Irwin Industries*, 304 NLRB 78 (1991), where it stated,

> It is not sufficient to find, as did the judge, that the unit in which bargaining was requested, i.e., all Irwin's maintenance employees (former Stockmar employees and its existing unrepresented work force), was appropriate. It is well established under the Board's successorship doctrine that, in order to establish the condition precedent for presuming continued majority support, the employees acquired from a predecessor themselves must constitute an appropriate unit.

Nevertheless, Respondent argued that only an overall unit of all its CIBA contract employees would be appropriate. Project Manager Outlaw is in charge of the overall contract operations including packaging and material handling (a total of approximately 300 employees); its employees other than packaging and material handling, work in the same areas using the same machines as those employees; other employees frequently perform packaging and material handling operations; and packaging and material handling employees frequently perform construction and maintenance work. All Respondent's CIBA facility employees undergo the same physical agility tests and receive the same safety orientation and testing. They all undergo the same hazardous material training, the same respirator training and the same fire extinguisher training.

Respondent went on to argue that all the packaging and material handling employees and approximately 80 of its construction and maintenance employees receive the same forklift training and LPG fueling training. Those same employees operate forklifts in their jobs.

Notices for available packaging and material handling positions are posted on bulletin boards in all construction and maintenance areas and packaging and material handling employees are eligible to apply for other Brown & Root jobs at CIBA. Educational training is available to all employees. Personnel records are maintained in the same place for all Respondent's CIBA employees; a single timekeeper maintains all timesheets; all its employees at CIBA have the same pay periods and receive their checks on the same day through the same distribution system. All Respondent's supervisors at CIBA have the same benefits and all its employees at CIBA have the same benefits. All its CIBA employees are covered by the same drug and alcohol policy; all employees including packaging and material handling go into the makeup of the executive safety committee. All its employees wear the same uniforms and participate in the same charity drives and programs.

It is evident from Respondent's argument that an overall unit of all Brown & Root's employees at CIBA's McIntosh facility may constitute an appropriate bargaining unit. However, as shown above, the question here is one of successorship and under that question, the only relevant question is does the former Brown-Eagle unit continue to be an appropriate unit. *Irwin Industries*, supra. "As the general principles discussion makes clear, the issue in a successorship situation is not whether a previously unrepresented unit is appropriate, but whether a historically recognized unit is no longer appropriate." *Trident Seafoods,* 318 NLRB 738 (1995).

Here, as in *Trident Seafoods, Inc*., supra, the Brown & Root packaging and material handling jobs do not differ from the jobs in existence before it obtained the contract and there is nothing in the record which warrants a finding that the unit is repugnant to Board policy. I find that the former Brown-Eagle unit continued to be an appropriate unit.

Respondent's refusal to recognize and bargain with the Union constitutes unfair labor practices in violation of Section 8(a)(1) and (5).

The Alleged Unilateral Changes

Respondent Allegedly Failed to Continue in Effect Mandatory Terms and Conditions of Employment

The General Counsel alleged that Respondent unilaterally changed terms and conditions of employment. As shown above, it became perfectly clear on or before May 27, 1998, that Respondent planned to employ a majority of its work force from the employees of Brown-Eagle. Respondent then engaged in both 8(a)(1) and (3) activity by, among other things, refusing to employ a majority of its unit employees from the predecessor employer's work force.

There is no allegation that Respondent was obligated to adopt the Union's collective-bargaining agreement with Brown-Eagle. However, the collective-bargaining agreement may be used in determining the working conditions that existed under Brown-Eagle. A comparison of those conditions as shown in the collective-bargaining agreement shows that Respondent implemented changed wages,[29] holidays,[30] vacation,[31]

[29] The Brown-Eagle unit wage rates varied from $7.50 for starting, to $9.50 an hour after 24 months with shift differential of 15 to 25 cents an hour (GC Exh. 11). Respondent did not vary pay by seniority. It paid $8.00 to $10.75 an hour with a 15–cent shift differential (GC Exhs. 7 and 49).

[30] Brown-Eagle paid double rates for 7holidays. Respondent did not recognize holidays for pay purposes (GC Exhs. 11, 7, and 10).

[31] Brown-Eagle employees accrued paid vacations of 1 week after 1 year of service and 2 weeks after 3 years of service (GC Exh. 11). Respondent unit employees are not entitled to any vacation pay until 4 years' service with Respondent (GC Exhs. 7 and 10).

and medical insurance.[32] Employees were denied their seniority status and required to start as new employees.

Justice White, on behalf of the *Burns* Court, wrote that it was "difficult to understand how *Burns* could be said to have changed unilaterally any preexisting term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit." Although Burns may have employed workers on terms different than those of its predecessor, Justice White noted that "it does not follow that Burns changed its terms and conditions of employment when it specified the initial basis on which employees were hired." However, he observed that "[a]lthough a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Later the Supreme Court made clear that this caveat concerning the duty to bargain over the initial terms refers to the "exceptional situation" whereas a successor's right to unilaterally establish its initial terms is the "standard situation." *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 at fn. 15 (1986).

In *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), the Board announced its intention to limit the application of the *Burns* caveat to cases "in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." The Board reaffirmed this approach in *Fremont Ford*, 289 NLRB 1290 (1988). *Advanced Stretchforming International, Inc*., 323 NLRB 529 (1997). (See also *NLRB v. Burns Security Services*, 406 U.S. 272, 294 (1972); *Galloway School Lines*, 321 NLRB 1422 (1996).

In light of the above, I shall examine whether Respondent "has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." As shown above, all of Respondent's communications with former Brown-Eagle employees before its operations started on June 10, occurred during meetings on May 26 and 27. The evidence as to what was said in those meetings includes the following: Joseph Freeman testified that Bill Outlaw told the employees they would have first chance at the Brown & Root jobs. John Simpson, Jr. recalled that Gordon Sloat said there was a strong possibility that the people already working there would get their jobs back. Charles Baxter testified that Outlaw said they would try and hire people in the plant and that Brown & Root did not want to bring in new employees. Bill Outlaw testified that he told the employees that Brown & Root was interested in receiving job applications from the former Brown-Eagle employees.

Nothing in the record revealed that Respondent informed the Brown-Eagle employees that it would retain all of them "without change in their wages, hours, or conditions of employment."

In consideration of whether Respondent "failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment," a review of the evidence shows that Respondent did not fail to announce its intent to establish a new set of conditions. For example Joseph Freeman testified that Outlaw said the Brown-Eagle employees would have to apply for Brown & Root jobs but they would get first choice of jobs. Freeman also testified there was some discussion of Brown & Root's pay rates and benefits. John Simpson recalled Gordon Sloat saying there was a strong possibility the employees in area 1 would get their jobs back. Felicia Brown testified that Bill Outlaw told the Brown-Eagle employees that if they applied it would be as "new" employees; that Brown & Root did not recognize seniority. Outlaw told the employees that if hired they would have to work under Brown & Root's terms. Charles Baxter recalled that Outlaw said that Brown & Root intended to stay nonunion. Bill Outlaw testified there was some employee questions about Brown & Root's benefits, holiday pay, vacations, and that type thing. He explained about Brown & Root's policy regarding those matters and he admitted that policy differed from the policies that had been in effect at Brown-Eagle. Rick Hopper testified that he explained Brown & Root's benefits to the Brown-Eagle employees during the first of the employee meetings at the Pavilion.

The above and the full record convinced me that Respondent did advise the Brown-Eagle employees that it intended to retain as many of them as practical. Respondent did not tell those employees that it intended to retain all of them. Additionally, Respondent advised those employees of its intent to make some changes. I find that Respondent did not tell the Brown-Eagle employees that they would all be hired and Respondent held out to those employees that working conditions would be different than under Brown-Eagle.

I find that Respondent did not engage in an unfair labor practice by setting initial terms and conditions of employment, which differed from those terms and conditions that existed with Brown-Eagle.

CONCLUSIONS OF LAW

1. Brown & Root, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers Union, Local 1657, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in conduct in violation of Section 8(a)(1) and (3) of the Act by refusing to hire its applicants listed below in the remedy because its employees engaged in

[32] Brown-Eagle paid full cost for employees' individual and 50 percent for family, medical, and life insurance premiums (GC Exh. 11). Respondent unit employees are entitled to major medical HMO coverage after 90 days' service with each employee required to pay $45 to $70 for individual and $194 to $279 for family, major medical HMO premiums (GC Exhs. 7, 10, and 44).

union and protected activity or in order to prevent its employees from being represented by a labor organization.

4. Respondent has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with United Food and Commercial Workers Union, Local 1657, AFL–CIO as the exclusive collective-bargaining representative of its employees in the following appropriate bargaining unit:

> All product handling employees currently or in the future who are employed by an employer at the CIBA Specialty Chemicals Corporation plant site in McIntosh, Alabama, including the warehouse, packaging and technical employees; excluding all other employees, including office clerical employees, professional employees, guards and supervisors.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

THE REMEDY

Having found that Respondent Employers have engaged in unfair labor practices, I shall recommend that each be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent has illegally refused to recognize and bargain, and has refused to hire former Brown-Eagle employees Sean Akridge, Michael Allen, William Anderson, Charles Baxter, Jimmy Beasley, Patrick Beech, Ray Christen, James Cooley, Clayton Davis, Stephanie Ervin, Samuel Everett, Joseph Freeman, Aaron Garner, Collier Garner, Kelvin Gould, Jimmie Grayson, Lamark Herring, Christopher Hill, Kelvin Houston, Bettie Jackson, Eric Jackson, Joseph Jackson, Nathaniel Jackson, Renee Jackson, Tony James, Jeff Koen,[33] Andre Love, Jimmie Mason, Derrick Mitchell, Ernest Moss, Marcus Nettles, Lester Oliver, Charles Presley, Sean Ratcliff, Kunta Reasor, Demarlo Reed, Freddie Reed, John Simpson, Jr., Dexter Sims, Dannie Skeene, Stuart St. John, Billy Sullivan, Latson Sullivan, Thad Taylor, Carl Thomas, Patrick Thomas, Heather Williams and Thomas Williams because of employees' Union or other protected activity or in order to prevent its employees from being represented by a labor organization, in violation of sections of the Act, I shall order Respondents to meet and negotiate on request with United Food and Commercial Workers Union, Local 1657, AFL–CIO; to offer immediate and full employment Akridge, Allen, Anderson, Baxter, Beasley, Beech, Christen, Cooley, Ervin, Everett, Freeman, Aaron and Collier Garner, Gould, Grayson, Herring, Hill, Houston, Bettie, Eric, Joseph, Nathaniel and Renee Jackson, James, Koen, Love, Mason, Mitchell, Moss, Nettles, Oliver, Presley, Ratcliff, Reasor, Demarlo and Freddie Reed, Simpson, Sims, Skeene, St. John, Billy and Latson Sullivan, Taylor, Carl and Patrick Thomas, and Heather and Thomas Williams to positions for which they are qualified, and to make the above-named employees whole for all loss of earnings suffered as a result of the discrimination against them. Backpay including lost pay and benefits, shall be computed as described in *Abilities & Goodwill, Inc*., 241 NLRB 27 (1979); and *F. W. Woolworth Co.***,** 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

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[33] Jeff Koen was not shown to have formerly worked for Brown-Eagle on R. Exh. 1. If there is an issue as to whether Koen actually worked for Brown-Eagle, that matter may be handled in compliance proceedings if necessary.